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ALEXANDER L. STEVAS,
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82-587

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent

-vs-

RONNIE D. MOORE

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the so-called drug courier profile alone may be used to select those citizens whom Federal agents may stop in order to investigate suspected drug law violations.

2. In a fact situation in which four D.E.A. officers surround a citizen at an airport, and where the D.E.A. agents did not indicate to the citizen that he was free to leave, was there a seizure of the citizen's person requiring probable cause.

3. Whether a series of suspicious acts and circumstances which give no objective facts relative to the investigation of a crime can constitute probable cause to arrest.

TABLE OF CONTENTS

	PAGE
Statement of Questions Presented	i
Table of Contents	ii
Index of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Statement of Facts	3
Reasons for Granting the Writ	6
I. THE SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE OF THE BROAD PUBLIC QUESTION INVOLVED	6
A. This Court should concisely and precisely define the extent to which law enforcement officers may interfere with the individual liberties of citizens in order to investigate criminal activities	6
II. THE SUBSTANTIVE ISSUE PRESENTED RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHICH SHOULD BE REVIEWED	9
A. A fact situation in which four D.E.A. officers surround a citizen at an airport and do not advise the citizen that he is free to leave is a	

sufficient show of force or authority so as to constitute a seizure of the citizens person and require probable cause 9

B. The Drug Courier Profile is not sufficiently selective to allow its use in selecting those citizens which Federal agents may detain in order to investigate suspected drug law violations 14

C. A series of suspicious acts and circumstances which give no objective facts, and require the subjective interpretation of the investigating officer cannot constitute probable cause to arrest 23

Conclusion 27

INDEX OF AUTHORITIES

CASES PAGE

Beck v. Ohio, 379 US 89 (1964) 26

Brown v. Texas, 443 US 47 (1979) 7, 25

Davis v. Mississippi, 394 US 721 ..... 10, 24, 25

Dunaway v. New York, 442 US 200 ..... 13a

Henry v. United States, 368 US 98 (1959) 11, 12, 23

Johnson v. United States, 33 US 10 27

Marron v. United States, 257 US 192 (1927) 8

Marshall v. Barlows Inc., 436 US 307 (1978) 8

Miranda v. Arizona, 384 US 436 13

Reid v. Georgia, 448 U.S. 438 (1980) 10, 11, 14, 21, 22

Sibron v. New York, 392 US 40 (1968) 23

Terry v. Ohio, 392 US 1 (1968) 6, 7, 10, 11, 14, 21, 23

United States v. Allen, 421 F Supp 1372 (E.D. Mich 1979) 17, 1

United States v. Andrews, 600 F2d 563 (6th Cir) cert den Sub Nom *Brooks v. United States*, 100 S Ct 166 (1979) 16, 17, 18, 19, 25

United States v. Ballard, 573 F2d 913 (5th Cir, 1979) 16, 18

United States v. Brignoni-Ponce, 422 US 873 (1975) . 8, 10, 23

United States v. Buenaventura-Airza, No. 79-1211 (2d Cir, 1980) 16, 17, 18

PAGE

United States v. Chambliss, 425 F Supp 1330 (E.D. Mich, 1977) 17

United States v. Chapman, 573 F2d 565 (9th Cir, 1977) 17

United States v. Coleman, 450 F Supp 433 (E.D. Mich, 1978) 16, 18

United States v. Cramer, 555 F2d 594 (6th Cir, 1977) 17

United States v. Elmore, 595 F2d 1036 (5th Cir, 1979), cert den 447 US 910 18

United States v. Elm, 595 F2d 1036 (5th Cir, 1979). 17

United States v. Floyd, 418 F.Supp 724 (E.D. Mich) aff'd in part, rev'd in part sub nom *United States v. Roseborough,* 571 F2d 584 (6th Cir, 1977) ... 16

United States v. Garcia, 450 F Supp 1020 (E.D.N.Y. 1978) 17

United States v. Himmelwright, 551 F2d 991 (5th Cir, 1977) 25

United States v. Kramer, 555 F2d 594 (6th Cir, 1977) 16

United States v. Lewis, 556 F2d 717 (6th Cir, 1977) 24

United States v. McCaleb, 552 F2d 717 (6th Cir, 1977) 17, 19

United States v. McClain, 452 F.Supp 195 (E.D. Mich, 1977) 15, 17, 19

United States v. Mendenhall, 446 US 544 (1980).... 9, 10, 11, 14, 17

United States v. Pope, 561 F2d 663 (6th Cir, 1977) . 16, 24

United States v. Price, 599 F2d 494 (2d Cir, 1979).. 16, 17

United States v. Rico, 594 F2d 320 (2d Cir, 1979) .. 16

PAGE

United States v. Requelmy, 572 F2d 947 (2d Cir, 1978) 16

United States v. Robles, 78 Cr L 70 (E.D. N.Y. May 15, 1978) 16

United States v. Smith, 574 F2d 882 (6th Cir, 1978) 16, 17

United States v. Vasquez, 612 F2d 1338 (2d Cir, 1980) 16, 17

United States v. Vasquez-Santiago, 602 F2d 1069 (2d Cir, 1979) 15, 16

United States v. Viegas, 639 F2d 42-44 (1st Cir) 27

United States v. Westerbohn-Martinez, 435 F Supp 690 (E.D.N.Y., 1977) 16, 17, 19

Wong Sun v. United States, 371 US 471 (1963) 25

LAW REVIEW ARTICLES

Comment, Fourth Amendment Rights of Persons Present When a Search Warrant is Executed: *Ibarra v. Illinois*, 66 Iowa L. Rev. 453 (1981) 8

Terry Revisited: Critical Update on Recent Stop & Frisk Developments, 1977 Wisc L Rev 877 . 8

Comment, Fourth Amendment — Airport Searches & Seizures: Where will the Court Land?, 71 J. Crim. L. & Criminology 499, 511-512 12

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 675 F 2d 802. A copy of the opinion appears in the Appendix hereto. The Order of the United States Court of Appeals for the Sixth Circuit denying Appellant's Motion for Rehearing is, as of this date, unreported. A copy of the Order also appears in the Appendix hereto.

The District Court wrote no opinion. Its oral opinion is appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1). The opinion of the Court of Appeals was filed on April 13, 1982. Appellant filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The Order of the Court of Appeals denying the Motion for Rehearing was filed on July 12, 1982. The Judgment and Mandate of the Court of Appeals was issued on July 20, 1982.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which the petition concerns is the Fourth Amendment to the United States Constitution which provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Ronnie D. Moore was indicted by a grand jury on August 21, 1980, for possession with intent to distribute approximately 220.97 grams of cocaine, a Schedule II controlled substance, in violation of 21 USC Sec. 841 (a) (1).

Prior to trial, defense counsel filed a Motion to Suppress all evidence which was seized during an unlawful search of the Defendant by Drug Enforcement Administration agents

at Detroit Metropolitan Airport on March 6, 1980. The hearing on the Motion was held immediately prior to trial on October 14, 1980, before the Honorable Charles W. Joiner. During the hearing, DEA Agents Robert Dunn, Richard McCoy, and Bruce Bryda testified as to the circumstances surrounding the arrest and subsequent search of Ronnie Moore. At the conclusion, from the bench, Judge Joiner denied Defendant's motion and Defendant then proceeded to trial. By agreement of both parties, the case was tried without jury on the evidence and testimony adduced at the hearing on the Motion to Suppress. Additionally, evidence was presented by stipulation and by the testimony of Agent Dunn as to the quantity and purity of the cocaine seized from the possession of Defendant Moore.

Defendant was convicted as charged. On December 2, 1980, Moore was sentenced to two years custody and three years special parole term.

STATEMENT OF FACTS

On March 6, 1980, at approximately 4:00 p.m., DEA agents Robert Dunn, Richard McCoy, Bruce Bryda, and Bill Modesitt were routinely observing the arrival of a nonstop Delta flight from Ft. Lauderdale, Florida. According to the testimony of Agent Dunn, he observed Ronnie Moore leave the jetway, one of the first passengers to deplane. Agent Dunn testified that he continued to observe Moore proceed to a telephone where he appeared to make two calls. As he walked, and as he used the telephone, Dunn testified that he observed furtive eye movements. The agents continued to observe Moore as he left the Delta concourse, bypassing the down escalator to the Delta baggage claim area, continuing through the upper level main lobby toward the American Airline counter. At that end of the building, Moore walked outside,

immediately reentered the terminal, proceeded down the escalator to the lower level, and left the building by the exit nearest the American Airline baggage claim area. (Diagram — Appendix A).

Outside, as Moore walked toward the taxi stand, he was stopped by the Agents. After identifying themselves, the agents asked Moore whether he was arriving or departing. Moore stated that he had missed his flight and was returning home. Thereafter, Dunn asked Moore if he had not just arrived from Florida to which Moore responded "not that he recalled". Moore further told the officers, in response to their question, that he did not have his airline ticket with him.

At that point, Moore was told by Agent Dunn that they were narcotic agents, that they were looking for narcotics, and that they would like to search his briefcase. According to Dunn, Moore did not object, nor did he object to accompanying the agents into the terminal.

Inside, Agent Dunn searched the briefcase, finding an airline ticket and scraps of paper bearing numerals, some of which he believed were related to cocaine trafficking, and two souvenir t-shirts. Having finished, Dunn told Moore he wanted to pat him down and, when Moore, appearing very nervous refused, Dunn placed Moore under arrest for possession of narcotics. After advising Moore of his rights, a search was conducted; Dunn discovered and seized a package containing a white powdery substance from Moore's coat pocket.

Throughout, Agent Dunn testified that he was familiar with and relied upon the drug courier profile; as he described his observations of Moore, he identified factors which were consistent with the profile.

Judge Joiner, in his oral opinion denying the Motion To Suppress, held, first, that DEA agents were justified in approaching Defendant and that such a stop is not an intrusion

within the meaning of the Fourth Amendment; and, second, that nevertheless, the investigative stop was founded on reasonable suspicion; and, third, that the subsequent arrest was founded on probable cause. Judge Joiner relied on the following factors as creating reasonable suspicion:

1. The defendant left the airline first or nearly first;
2. Defendant made unusual glances after leaving the airplane and while using the telephone.
3. The defendant took an unusual route through the airport to the taxi.

The Court concluded that this conduct was "out of the ordinary and exhibits something different than the normal traveler." The Court found probable cause, relying, in addition to the facts articulated above, on the fact that the Defendant responded to the agents with two demonstrably false statements, that is, that he did not just arrive from Florida and that he did not have his ticket, on the fact that the Defendant exhibited nervousness and shaking while being questioned, and on the fact that Defendant arrived from a city known to be a source of narcotics (a source city).

The Sixth Circuit affirmed the conviction, holding:

1. The initial stop was nothing more than "personal intercourse" between the agents and Mr. Moore, and
2. The false statements, together with the numbers on the pieces of paper gave the agents probable cause to arrest Mr. Moore.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE OF THE BROAD PUBLIC QUESTION INVOLVED.

A. THIS COURT SHOULD CONCISELY AND PRECISELY DEFINE THE EXTENT TO WHICH LAW ENFORCEMENT OFFICERS MAY INTERFERE WITH THE INDIVIDUAL LIBERTIES OF CITIZENS IN ORDER TO INVESTIGATE CRIMINAL ACTIVITIES.

In *Terry v. Ohio,* 392 US 1 (1968), this Court allowed a police stop and weapons pat-down on a showing of suspicion less than probable cause. The decision was based on several principles of broad application. The Court explained the correct analytical approach in determining the Fourth Amendments applicability: "to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all of the exigencies of the case, a central element in the analysis of reasonableness." 392 US at 18 n. 15. The fact that a given police action might be less intrusive than a traditional search, therefore, does not insulate it from Fourth Amendment scrutiny; rather, the lesser intrusion is only a relevent factor in deciding whether the invasion was reasonable.

The Court also held that the level of intrusion must be balanced against the need for government action. *Id* at 23. The Court indicated that the government need must be specific, e.g. The police officers' need to protect themselves in *Terry,* not merely "the governmental interest in investigating crime," *Id* at 23.

Finally, the Court made it clear that although less than probable cause sufficed to justify certain "lesser" intrusions, police action must be based on at least "specific and articulable facts which, taken together with rational inferrences from those facts, reasonably warrant that intrusion." *Id* at 21. An officer's "inchoante and unparticularized suspicion or hunch" will not suffice. *Id* at 27.

Since the decision of *Terry,* the decisions of the United States Supreme Court, and the lower Courts have been less than consistent. They present the appearance of being determined on an essentially ad hoc basis, with certain factors balanced in some situations and ignored in others. A more coherent method of analysis is necessary if *Terry* is to be a valued tool for achieving a successful balancing of police need and citizen rights.

In light of this Court's concerns for the growing volume of litigation, and the concern of the legal community in general for a uniformity of approach, it is appropriate for this Court to review the entire "lesser intrusion" question in order to reduce growing appellate litigation, give lower Courts firm guidance on what is and is not constitutionally acceptable, and to clarify for the bar and the public the Constitutional Standard to be applied.

The present state of the law, with its inconsistent and unclear standards, threaten to place the Courts in a position where Court (i.e. civilian) control over police activity is lost. The present system leaves too much room for arbitrary police action which can be post hoc justified; increasing the potential for abuse in governmental selection of targets for intrusive action. This Court has many times recognized the need for uniform, objective standards, both to assist police in knowing the appropriate scope of authority, and to prevent abuses. In *Brown v. Texas,* 443 US 47, 52 (1979) this Court said that when

stops are not based upon objective criteria, "the risk of arbitrary and abusive police practices exceeds tolerable limits".

This Court has long understood the need to place limits upon law enforcement discretion. In *Marshall v. Barlows' Inc.*, 436 US 307, 323-24 (1978) it held, "the authority to make warrantless searches devolves almost unbridled discretion." This Court also recognized the dangers of indiscriminate law enforcement in *United States v. Brignoni-Ponce,* 442 US 873, 882-85 (1975).

This interest in maintaining objective standards and limiting the discretion of police officials is not of recent vintage. In *Marron v. United States,* 257 US 192, 195-197 (1927) the Court placed the need for limits in historical perspective.

This Court's failure to clearly define the frontiers of this area have left the legal community in a state of confusion and has resulted in some scholarly criticism; e.g., *Terry Revisited: Critical Update On Recent Stop and Frisk Developments,* 1977 *Wisconsin L. Rev.* 877, 879; (Court's failure to define reasonable suspicion has "produced a maelstrom of conflicting interpretations") *Comment, Fourth Amendment Rights of Persons Present When A Search Warrant is Executed: Ibarra v. Illinois,* 66 Iowa L. Rev. 453, 458-460, 463 (1981) (no attempt to "clarify the difference between the articulable suspicion and probable cause standards").

This Court must, therefore, act definitively in this area. The case at bar provides ample opportunity for the Court to explore the entire realm of less-than-probable-cause intrusions. The facts establish what was intended to be a less than full seizure; action taken by law enforcement officials based upon actions they considered to be suspicious; governmental interests in law enforcement running in direct conflict with the individual liberties to be free from governmental intrusions. This case provides the Court with an opportunity to review

and deal with all of the particularized elements of the so-called "lesser intrusions" cases. This case, therefore, offers to the Court a substantial opportunity to clarify the law in this area and to offer substantial guidance to the lower Courts in such a manner as will reduce the amount of debate and discussion in the trial Courts, and reduce the work load of the judiciary.

II.

THE SUBSTANTIVE ISSUE PRESENTED RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHICH SHOULD BE REVIEWED.

A. IN A FACT SITUATION IN WHICH FOUR DEA OFFICERS SURROUND A CITIZEN AT AN AIRPORT, AND WHERE THE DEA AGENTS DID NOT INDICATE TO THE CITIZEN THAT HE WAS FREE TO LEAVE, THERE WAS A SEIZURE OF THE CITIZENS' PERSON REQUIRING PROBABLE CAUSE.

The trial Court held that the stop involved in the instant matter was not an investigatory stop within the meaning of the Fourth Amendment, and does not, therefore, necessitate a traditional inquiry into the lawfulness of the seizure of the defendant and the subsequent search of his person. In reaching this decision the trial court held, relying in part on the minority opinion written by Justice Stewart in *Mendenhall, supra*, page 510. When Defendant was approached by agents Dunn and McCoy, the agents were performing a reasonable police function which did not amount to a detention of Mr. Moore. The view of Mr. Justice Stewart was not ac-

cepted by a majority of this Court in the *Mendenhall* case. The concurring opinion of Mr. Justice Powell stated that the issue of whether or not there was a seizure of the Defendant's person was resolved by the following analysis: "for me, the question was whether the respondent in this case reasonably could have thought she was free to walk away . . ." *Id* at 560, n.l. It is also important to note that in the very next airport search decision rendered by this Court that is *Reid v. Georgia, supra*, no member of this Court, including Mr. Justice Stewart, the analysis employed by the trial Court in the case at bar.

Reid involved a fact situation similar to both *Mendenhall* and the case at bar, in the manner in which *Reid* was approached and detained by the DEA agents. There, this Court rejected the government's contention that the detention of *Reid* was not a seizure, and therefore not subject to Fourth Amendment review.

> "The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of arrest." *Davis v. Mississippi*, 394 US 721 (1969); *Terry v. Ohio*, 392 US 1 16-19 (1968); *United States v. Brignoni-Ponce,* 422 US 873, 878. f.n. 2. While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a persons liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. (Cit. omitted).
>
> "fn 2. obviously, not all personal intercourse between policemen and citizens involves seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way

> restrained the liberty of a person may we conclude that a seizure has occurred. *Terry v. Ohio*, 392 US 1, 19 n. 16. See also *Id* at 34 (White, J. concurring); *Id*, at 31, 32-33 Harlan, J. concurring). *Reid* at 894.

The facts involved in the case at bar meet the seizure tests set forth in *Reid*. Defendant was leaving the airport when two DEA agents stepped in front of him and prevented his further travel. Two other agents positioned themselves approximately ten feet behind the Defendant. The agents then requested that Mr. Moore produce for them his driver's license for identification purposes. Mr. Moore's liberty of movement was clearly restricted at this point. At trial, the DEA agents stated that they could not say that Mr. Moore was free to leave. In *Mendenhall*, however, under similar circumstances, the DEA agents indicated that Ms. Mendenhall was not free to leave. In *Henry v. United States*, 361 US 98 (1959) these circumstances were recognized as being sufficient exercise of authority to constitute an arrest. "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, were complete." 361 US at 103. Unlike *Mendenhall*, defendant here was given no indication by the agents that he had any right to decline to cooperate with the agents.

The suggestion by the Sixth Circuit that because the agents asked politely "can I ask you a few questions?" took these facts out of the "show of authority" realm, is not supported by the law. Initially, it defies common sense to say that an individual who is suddenly surrounded by Federal Narcotics Agents believes that he has a right to refuse the agent anything. Obviously, the stop is less intimidating if the agents are polite and do not show weapons. But, the question whether fourth amendment protections do or do not apply should not turn on fine evidentiary points concerning the agents' attitudes and demeanor; especially when they depend

on the agents' conduct *after* commencement of the confrontation. Indeed, such a standard would allow agents who act politely to indulge in unfettered, potentially arbitrary exercises of discretion in selecting citizens for "mannerly" treatment. While the case at bar concerns the question of the admissability of evidence that is seized, it must be remembered that the Fourth Amendment's concern is not principally with evidentiary questions. The concern of the Fourth Amendment is the right and ability of persons to exist and carry on their daily activities without arbitrary police interference.

The Sixth Circuit's characterization of this stop as "personal intercourse" between the agents and the defendant is not supportable. Personal intercourse between officers and citizens is suggested by a situation where an officer on the street sees a commotion and approaches a group of people or even a single individual, and asks "What happened?" In such a case, with or without a show of authority, it is clear that the officer is only attempting to establish the most basic of facts, not to investigate specific known criminal activities. If the question "what happened?" uncovers evidence or gives rise to reasonable suspicions that permit more intrusive action (such as a patdown), it is not the result of any seizure. On the other hand, where a number of officers are involved in a specific investigation and jointly single out a target and jointly confront the target, it is clear that more than "personal intercourse" has taken place.

In *COMMENT, FOURTH AMENDMENT — AIRPORT SEARCHES AND SEIZURES: WHERE WILL THE COURT LAND?, 71 J. Crim L. and Criminology 499, 511-512*, the commentator suggests a rule distinguishing between stops designed to provide information to aid investigation, and stops directed investigating a particular person, based upon the grounds that the later is more intrusive because the target is in danger of incriminating himself. While that analysis is not en-

tirely satisfactory, since it leaves almost as many fine distinctions as it seeks to eliminate, such a rule at least creates a somewhat better understanding of the difference between personal intercourse and investigatory stops and seizures. This Court has long recognized that only when police procedures are virtually immuned from arbitrary action could the encounter between the officer and the citizen restricting the citizens liberty be considered *de minimus,* or personal intercourse.

It is important to note, that although the Sixth Circuit recognized Mr. Justice Powell's freedom to walk away standard as governing the question of whether or not a seizure had taken place, and then went on to characterize the encounter in the case at bar as personal intercourse, the Court stopped far short of saying that the facts and circumstances involved in this case were such that the defendant could have reasonably concluded that he was free to leave. Such a conclusion could have not been reasonably reached. As noted above, Mr. Moore was surrounded by the Federal Agents. Although they requested identification and began questioning, at no time did the agents advise Mr. Moore that he had no obligation to speak with them, or that he was free to leave. Since the investigation had focused on Mr. Moore, the questioning took place under circumstances which this Court had previously described as "custodial", *Miranda v. Arizona* 384 US 436, 444. Setting aside the Fifth Amendment implications of this interrogation, it is clear that considering all the circumstances, including the fact that the agent, upon cross examination could not say whether Mr. Moore was free to leave, a seizure of Mr. Moore's person took place at the time that he was stopped and questioned by the agents, and that unless that seizure was based upon probable cause, or a minimal reasonable suspicion, it was an unlawful seizure of his person, requiring supression of all of the evidence and information obtained from him.

B. THE DRUG COURIER PROFILE IS NOT SUFFICIENTLY SELECTIVE TO ALLOW ITS USE IN SELECTING THOSE CITIZENS WHICH FEDERAL AGENTS MAY DETAIN IN ORDER TO INVESTIGATE SUSPECTED DRUG LAW VIOLATIONS.

Terry v. Ohio, 392 US 1 (1968) was, in most respects, a narrow decision. It dealt with a specific government interest-protection of police officers in street encounters. In order to accommodate that interest, *Terry* held that less than probable cause could support protective police action. There is no sound way to quantify how much less, but clearly, the Court expected officers to have in hand a sufficient amount of information to protect against the possibility that suspects would be chosen arbitrarily.

In *Reid v. Georgia,* 448 US 438 (1980), in a *per curiam* opinion, this Court made it clear that, despite the Court's rulings in *United States v. Mendenhall,* 446 US 544 (1980), this Court would clearly not sanction virtually random searches premised on an "inchoate and unparticularized suspicion or hunch". (Citing *Terry v. Ohio,* 392 US 1, 27 (1968).

In the case before the Court, the DEA agents using the Drug Courier Profile were acting solely upon an "inchoate and unparticularized suspicion or hunch".

At the point Moore was approached and detained, agents had observed Moore arrive on a Delta flight from Ft. Lauderdale and leave the jetway among the first passengers; Dunn had observed him glancing "furtively" from side to side as he walked through the concourse and as he used the telephone facilities; finally, the agents followed Moore through the airport as he took what agents testified to be a circuitous or "evasive" route. These observations reflect and relate direct-

ly to an amorphous compilation of factors which, when taken together in any combination is intended to identify a drug courier.

The "drug courier profile" was apparently developed initially by Special Agent Paul Marconi to identify airline travelers who *might* be engaging in the transportation of narcotics. See, *United States v McClain,* 452 F Supp 195 (E.D. Mich., 1977). As described by Marconi, the profile characteristics were relevant in that they aided in the identification of characteristics not exhibited by a normal traveler.

> Basically, it's a number of characteristics which we attribute or which we believe can be used to pick out drug couriers. And these characteristics are basically things *that normal travelers do not do,* and in other words, you may have one characteristic that will apply to someone but not a number of them. (Emphasis supplied) *United States v. McClain, supra,* at 199.

Thus, the validity of the profile in providing an articulable basis for reasonable suspicion depends on the accuracy of the observation of the behavior, and, secondly, depends on a consistent application of these factors. It is, therefore, instructional to identify factors which have been advanced as the basis for a number of airport searches. The list that follows represents a gleaning of profile characteristics from various reported cases. This list is specifically limited to those characteristics which concern behavior exhibited by the defendant in the instant case, or, significantly, which are inconsistent with the behavior attributed to the defendant.

1. Making a complete loop in baggage area before leaving the door. *United States v. Vaquez-Santiago,* 602 F2d 1069 (2nd Cir., 1979).

2. Leaving the baggage area — one behind the other to the taxi stand. *United States v. Vasquez*, 612 F2d 1338 (2nd Cir., 1980).

3. Obtaining luggage and try immediately to leave airport. *United States v. Rico*, 594 F2d 320 (2nd Cor., 1979). *United States v. Smith*, 574 F2d 882 (6th Cir., 1978).

4. Not claiming any luggage. *United States v. Requelmy*, 572 F2d 947 (2nd Cir., 1978). *United States v. Floyd*, 418 F Supp 724 (E.D. Mich.) *aff'd in part, vacated and reversed in part sub nom United States v. Roseborough*, 571 F2d 584 (6th Cir., 1977).

5. Walking straight to baggage area on deplaning. *United States v. Buenaventura-Airza*, Docket No. 79-1211, page 787 (2nd Cir., January 3, 1980).

6. Not walking straight to baggage area on deplaning. *United States v. Ballard*, 573 F2d 913 (5th Cir., 1979). *United States v. Coleman*, 450 F Supp 433 (E.D. Mich., 1978).

7. Looking around gate area and baggage area. *United States v. Vasquez-Santiago, supra, United States v. Price*, 599 F2d 494 (2nd Cir., 1979).

8. Looking behind. *United States v. Westerbohn-Martinez*, 435 F Supp 690 (E.D. N.Y., 1977).

9. Not looking around — eyes down. *United States v. Robles*, 78 C.R. 70 (E.D.N.Y., May 15, 1978 — Weinstein, J.)

10. Nervousness and looking around. *United States v. Pope*, 561 F 2d 663 (6th Cir., 1977). *United States v. Kramer*, 555 F2d 594 (6th Cir., 1977). *United States v. Andrews*, 600 F2d 563 (6th Cir.) *cert. denied, sub nom Brooks v.*

United States, 100 S Ct. 166 (1979). *United States v. Allen,* 421 f Supp 1372 (E.D. Mich. 1979).

11. Manner of looking indicated nervousness. *United States v. Westerbohn-Martinez,* 435 F Supp 690 (E.D.N.Y., 1977).

12. Extreme nervousness when stopped. *United States v. Chapman,* 573 F2d 565 (9th Cir., 1977).

13. Brief phone call in baggage area. *United States v. Price, supra. United States v. Allen, supra. United States v. McClain, supra.*

14. Carrying no luggage. *United States v. Chapman, supra. United States v. McCaleb, supra. United States v. Smith, supra. United States v. Elm,* 595 F2d 1036 (5th Cir., 1979). *United States v. Cramer,* 555 F2d 594 (6th Cir., 1977).

15. Passenger traveling alone. *United States v. Chapman, supra. United States v. Smith, supra.*

16. Not being met at airport. *United States v. Smith, supra.*

17. Deplaning the middle of the line of deplaning passengers. *United States v. Buenaventura-Airza, supra.*

18. Delaying a line of passengers deplaning. *United States v. Price, supra.*

19. Last passenger to disembark. *United States v. Vasquez, supra. United States v. Mendenhall, supra.*

20. Disembarking after three-quarter of passengers disembark. *United States v. Garcia,* 450 F Supp 1020 (E.D.N.Y., 1978).

21. Going to an area where no public transportation is available. *United States v. Chambliss,* 425 F Supp 1330 (E.D. Mich., 1977).

22. Walking straight to baggage area on deplaning. *United States v. Buenaventura-Airza, supra.*

23. Not walking straight to baggage area on deplaning but going to taxi stand. *United States v. Ballard,* 573 F2d 913 (5th Cir., 1979). *United States v. Coleman,* 450 F Supp 433 (E.D. Mich., 1978).

24. Strange movement. *United States v. Elmore,* 595 F2d 1036 (5th Cir., 1979) *cert denied,* 447 US 910.

In addition to the profile characteristics, there are the multitude of cases which identify, as a characteristic of the profile, an arrival from a "source city"; enumeration of those cases, where the source city is identified, would seem unnecessary in view of the following language:

> (O)ur experience with DEA agent testimony in other cases make us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on the way to a major narcotics distribution center. *United States v. Andrews,* 600 F2d 563, 567 (6th Cir., 1979).

A cursory examination of this list necessitates a conclusion that, for the most part, the described characteristics are consistent, rather than inconsistent, with the behavior of an innocent traveler and, further, is conclusive in that it betrays a marked internal inconsistency. In other words, the factors relied upon by DEA agents in identifying potential drug couriers are no more than a useless amalgam of after-the-fact observations.

In the instant case, agents observed that Ronnie Moore was one of the first passengers to deplane. As indicated by the above list, this factor inconsistently applied in that in previous cases agents have suggested that a drug courier will deplane in

the middle of the group of deplaning passengers or, on occasions, deplane last. This factor is remarkable only in that based on previous experience, agents should surmise that the order of disembarkation is irrelevant.

To the extent that Defendant Moore exhibited nervousness at any point following his disembarkation, fear of airplane travel or any number of other reasons renders this factor insignificant. As the Sixth Circuit has recently noted:

> We agree with district court that nervousness by two of Andrews' companions should be entitled to no weight. Nervousness is entirely consistent with innocent behavior, especially at an airport where a traveler may be anticipating a long awaited rendevous with friends or family. *United States v. McCaleb,* 552 F2d 717, 720 (6th Cir.); *United States v. McClain,* 452 F Supp 195, 200 n. 3 (E.D. Mich., 1977).

Similarly, in *United States v. Andrews,* 600 F2d 563 (6th Cir., 1979) and *United States v. Westerbohn-Martinez,* 435 F Supp 690 (E.D.N.Y., 1977), those courts have observed that apparent nervous behavior is not inconsistent with behavior exhibited by an innocent traveler.

Although the DEA agents did not describe Defendant Moore's behavior as nervous until he was approached by DEA agents, nervousness *per se* is not inconsistent with the behavior of Defendant Moore, as described by agents, upon disembarkation. Specifically, agents noted in their testimony that Moore glanced around furtively while he was proceeding from the jetway to the telephone facility and while making telephone calls; this behavior is as consistent with nervousness as it is consistent with furtiveness. Indeed, the entirety of Defendant Moore's actions could then be described as nervous. This behavior has, thus, no independent significance.

In the event that this Court considers, as did the lower court, that furtive glancing is significant, the question remains whether furtive glancing is indicative of behavior inherently consistent with the transportation of narcotics. It is equally as possible that, despite agent Dunn's testimony that there are only two reasons for such furtive glancing, Moore was looking for or attempting to avoid someone other than a DEA agent. (App 62).

Moreover, the description of the route taken by Moore through the airport falls, similarly, in the same category. The route taken by Moore through the airport is a no win situation. Leaving the terminal directly through the baggage claim area, or indirectly through any other exit, would apparently fall within the enunciated profile characteristics. Any airline traveler knows, navigation through an unfamiliar airport terminal is, at best, an awkward and confusing experience. It is inconceivable that Defendant's election of a particular exit would suggest evasiveness, rather than that he was lost, misjudged, or had made some conscious decision in his efforts to locate the closest taxi stand.

Additionally, as can be seen from Appendix A and the agent's description of the Defendant's travel path (Appendix, Page 45,), the route followed by Mr. Moore was really not "circuitous". Defendant disembarked from a Delta Airlines flight and, after briefly stopping to use the telephone, followed a direct, non-stop, path from the gate to a terminal shared by both Delta Airlines and American Airlines. Defendant's path of travel took him to the south entrance/exit where he exited the terminal and then immediately re-entered the terminal at the same location. Upon re-entering the terminal, Defendant descended the stairway immediately adjacent to the south entrance/exit and exited the terminal using doors that were at the foot of the stairway. At this point at the Detroit Metropolitan Airport, the distance between the doorway and the curb,

where Defendant was about to enter a taxi, is only a few steps. Nonetheless, before Mr. Moore could take the few steps from the doorway to the curb, agents Dunn and McCoy suddenly appeared before him, identifying themselves as law enforcement officers, advising the Defendant they were investigating narcotics transportation, and then asking "Can I ask you a few questions?" The other two agents involved in this case were approximately ten feet behind the Defendant, immediately inside the terminal doors (Appendix, Pages 68-69).

Indeed, nothing in the behavior of Moore, as identified by testifying DEA agents, is either inconsistent with innocent behavior, or consistent with the amorphous "drug courier profile". As noted by the United States Supreme Court in *Reid v. Georgia, supra,* these circumstances describe "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify seizure." *ID,* at 894.

Clearly, these flimsy factors do not constitute the kind of reasonable suspicion envisioned by *Terry v. Ohio,* 392 US 1, (1968) and its progeny. Having rejected a *per se* application of the "drug courier profile", each Court examining the foundation for an investigatory stop must, nevertheless, examine the underlying factors which contribute to the articulated reasonable suspicion. Those factors may, as in this case, be drawn from the characteristics which normally compile that profile. Nevertheless, those factors must be weighed individually. Where they neither individually indicate that "criminal activity was afoot", See *Terry v. Ohio, supra,* at 27-28, nor are they remarkably consistent or isolated in application, these factors carry no greater weight because they are identified as factors in the drug courier profile. The factors described above which are neither inconsistent with normal

behavior nor consistent with a standardized profile carry no greater weight by accumulation than they do independently.

Indeed, the factors advanced in support of this stop are no more indicative of criminal activity than those rejected by the Supreme Court in *Reid*.

In that case, the lower court's conclusion that the DEA agent reasonably suspected the defendant was based on its acceptance of a representation that the observed factors or behavior, according to the agent, fit the "drug courier profile". As identified by the Court, the relevant facts were:

> (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags. *Reid,* at

The Supreme Court found that "[t]he agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.*

C. THE ARREST OF DEFENDANT AFTER HE REFUSED TO PERMIT THE AGENTS TO SEARCH HIM WAS UNLAWFUL BECAUSE IT WAS NOT SUPPORTED BY PROBABLE CAUSE

Appellant would first state to the Court that he does not concede that the initial investigatory stop was not, in fact, an arrest. By all traditional criteria employed to determine point of arrest, Mr. Moore was in fact arrested by the agents long before they formally advised him that he was under arrest. As noted above, Mr. Moore was deprived of his liberty by virtue of the fact that he was not free to leave at any time he chose, *Henry v. United States*, 368 US 98 (1959); the purpose of the detention exceeded the legitimate scope of a brief *Terry* stop. *Sibron v. New York*, 392 US 40 (1968); and the length of the detention exceeded that permitted by *Terry*. *United States v. Brignoni-Ponce* 422 US 873 (1975). However, since defendant has pointed out to the Court that the initial stop was unlawful, even under reasonable suspicion standards, defendant will not belabor the issue as it relates to arrest. Appellant would simply state to the Court that since the initial stop was unlawful, any information or evidence obtained thereafter must be regarded as unlawful "truth" of that unlawful detention. Such evidence could not, therefore, establish probable cause to arrest, or to convict the defendant.

Setting aside the question of the initial stop and detention as an arrest, then, Mr. Moore was "formally" arrested inside the terminal following his refusal to allow the DEA agents to search his person. Neither the information available to the agents preceding the initial stop, nor the information acquired during Moore's detention were sufficient to support probable cause.

While the Sixth Circuit has held that meeting drug courier profile criteria will not support probable cause, see *United*

States v. Lewis, 556 F2d 717 (Sixth Cir. 1977), the Court has stated that "facts known to the agents which correspond to characteristics in the profile may be considered along with information obtained from other sources in determining that the agents did have probable cause to believe that an offense is being or has been committed." *United States v. Pope*, 561 F2d 663, 667 (6th Cir. 1977). Thus, it is the facts known to the agents acquired subsequent to the initial stop which must be analyzed. The 6th Circuit in the instant cause recognized this fact and held that had they not characterized the initial stop as "personal intercourse" the stop would have been unlawful because all of the factors up to the stop did not constitute reasonable suspicion of criminal activity, much less probable cause.

The factors which must be analyzed to determine whether they constitute probable cause are (1) that Moore lied about his arrival from Florida; (2) that Moore lied about possessing an airline ticket which was discovered during a search of his briefcase; (3) that he was carrying scraps of paper in his briefcase which bore random numerical notations, and (4) that he became nervous when he was requested to submit himself to a pat down search. Even added to the profile factors, this information does not amount to probable cause to believe that a crime had been or was being committed.

Moore's refusal to admit to DEA agents that he had just arrived from Florida does not point to possession of a controlled substance. It does, however, exhibit an unwillingness to cooperate with law enforcement agents. While defendant's desire to be uncooperative with agents may or may not be suspicious, it is not probable cause for an arrest. If the police have no right to compel citizens to answer their questions about suspicious circumstances, *Davis v. Mississippi*, 394 US 721, 727 fn 6, then it is equally true that mere failure to answer a police officers questions truthfully cannot constitute a crime

or probable cause for arrest. In *Wong Sun v. United States*, 371 US 471, 483 (1963), the Supreme Court rejected a government contention that flight in and of itself established probable cause. The Court held that flight and refusal to admit a police agent was "ambigious" conduct which "signified guilty knowledge no more clearly than did a desire to repell an apparently unauthorized intrusion." Here the refusal to answer the police questions honestly, signifies criminal conduct no more than it signifies a desire to avoid dealing with the police at all, which is exactly what *Davis* indicates is permitted. If police authority can only be exercised upon a showing of probable cause, then there is clearly no justification for implying that refusal to cooperate with the police in the actions of probable cause is in and of itself probable cause to believe that a crime has been committed.

Similarly, the nervousness which Moore is alleged to have exhibited at this juncture is at best ambigious conduct which may have been directly created by this "unauthorized intrusion". Courts have consistently refused to recognize nervousness as an indication of guilt; see for example, *United States v. Andrews,* 600 F2d 563-566 (6th Cir., 1979). Because determining the origin of such nervousness requires speculation of the grossest kind, it cannot satisfy the Fourth Amendment's insistance on particularized and focused objective criteria, *Brown v. Texas,* 443 US 47-52 (1979). Indeed any citizen might find himself extremely nervous when suddenly surrounded by four DEA agents requesting the individual give an accounting of himself. Under these circumstances failure to become nervous might be viewed as more suspicious. In fact, in *United States v. Himmelwright,* 551 F2d 991, 992 (6th Cir., 1977), the government argued that it was suspicious for a woman going through customs to be excessively calm. The government can't have it both ways. If our system of government is to continue to be based upon the presumption that the law is designed to give citizens notice of

what is expected and acceptable conduct, then this Court must act to draw firm lines circumscribing the limits of acceptable police conduct, and giving the citizenry notice of what conduct will bring them under police scrutiny.

As a result of the search of Mr. Moore's briefcase, the DEA agents had obtained his flight ticket and some scraps of paper upon which were randomly written many numbers. Discovery of the flight ticket added nothing to the agent's information; they were already aware that he had arrived on a Delta flight, and were already aware that he did not intend to give them that information voluntarily. The note paper bore many numbers. Agent Dunn, selected one number from the random numbers on the sheet, 1,800, and said that it was his belief that that figure indicated a narcotics transaction, claiming that cocaine "roughly sells for $1,800.00, $2,200.00 an ounce." Since the 1,800 figure was only one of, at least, ten figures, and since the possibilities with respect to these computations are endless, the agents conclusion was a classic "inchoate and unparticularized suspicion or hunch." Indeed, at the trial the testimony of the agent was that it was his *opinion* that that was what the figure represented. He offered no other basis for that opinion.

Neither the production of the ticket nor the discovery of the random numbers can provide any weight in the probable cause analysis; they are, in and of themselves, totally amorphous. Nothing in the factual context of this case would warrant raising them to the level of probable cause.

In sum, then, the totality of the facts known to the agents were insufficient to satisfy the standards of probable cause as set forth in *Beck v. Ohio,* 379 US 89 (1964).

> Whether the arrest was consitutionally valid depends in turn upon where, at the moment the arrest was made, the officers had probable cause to

> make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. (Citations omitted)

The government conceded in the trial court that were it determined that either the initial stop or the subsequent arrest were constitutionally impermisible, then the evidence obtained would have to be excluded, under the fruit of the poisonous tree doctrine. The government having conceded that issue, there is no point in belaboring it before this Court.

CONCLUSION

This country long ago rejected the concept that those charged with enforcement of the law were fit persons to subjectively determine what is and is not probable cause to believe criminal activity is afoot, *Johnson v. United States,* 33 US 10, 14. If the opinion of the trial court and the Court of Appeals are allowed to stand, this Court will have taken a major step toward abandoning the demands of the Fourth Amendment which are intended to protect all of us, guilty and innocent alike. The decision of the Court of Appeals does violence to the entire historical development of the Fourth Amendment. If the opinion of the Court of Appeals is not reversed then the question of whether an individual might reasonably believe himself to be free to leave the presence of a police officer, i.e. whether or not the individual has been seized within the meaning of the Fourth Amendment, might well be dictated ultimately be whether or not police officers have good manners, e.g. *United States v. Viegas,* 639 F2d 42-44 (1st Cir.).

While such a result might be a boon for charm schools and other similar institutions, it cannot be constitutionally adequate.

If the opinion of the Court of Appeals is allowed to remain undisturbed, this Court will also have taken a substantial step toward abandoning all of the traditional demands of probable cause and sanction seizures and detentions of individuals based upon the subjective suspicions of police officers, no matter how fallacious or unreliable the assumptions upon which they are acting might be.

This court should grant this petition for Writ of Certiorari and reverse the opinion of the Court of Appeals.

Respectfully submitted:

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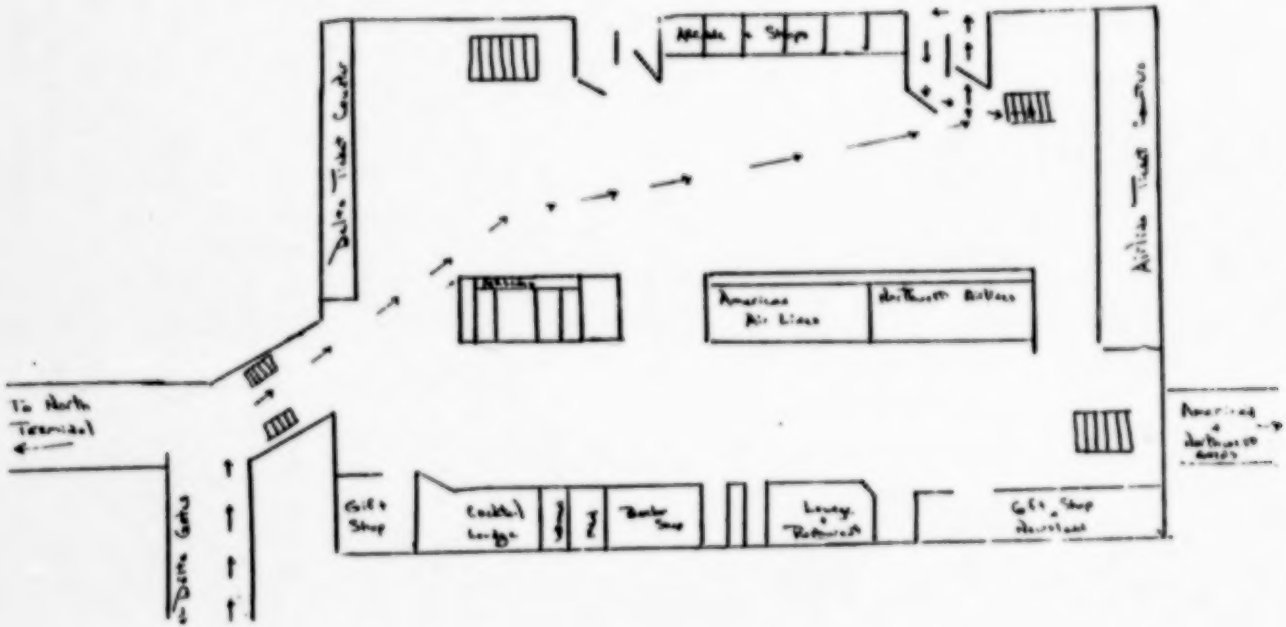
APPENDICES

APPENDIX A

Diagram — Upper Level
South Terminal
Detroit Metropolitan Airport

LEGEND
Path followed by
Ronnie D. Moore
Up/Down Stairways
Entrance/Exit



APPENDIX B

No. 80-1832

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONNIE D. MOORE,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 13, 1982

Before: EDWARDS, Chief Circuit Judge, LIVELY and KEITH, Circuit Judges.

EDWARDS, Chief Judge. This case presents, with some variations, the airport stop and search problems with which this court has dealt in *United States* v. *McCaleb,* 552 F.2d 717 (6th Cir. 1977), *United States* v. *Mendenhall,* 596 F.2d 706 (1979) *rev'd,* 446 U.S. 544 (1980), and *United States* v. *Jefferson,* 650 F.2d 854 (6th Cir. 1981). In each of the cases cited above, this court and the Supreme Court in *Mendenhall* has dealt with three separate phases of Fourth Amendment concerns. The first relates to the approach or stop of a citizen by a police officer. The second concerns voluntary surrender or involuntary seizure of drugs. The third concerns arrest.

Thus far, it is rare indeed for drug enforcement agents to employ search warrants in these and similar cases. As the facts in this case will indicate, opportunity for employment of the provisions under federal law for law enforcement officials to

procure search warrants by telephone would have been difficult if not impossible, in spite of ready availability of Magistrates on duty in the vicinity of most major airports.

Our instant case opens with four drug enforcement agents on duty at the Detroit Metropolitan Airport when a Delta flight from Fort Lauderdale, Florida landed. Two of the agents, Dunn and McCoy, both experienced in drug enforcement work observed the passengers landing from this flight presumably because of knowledge that drug couriers frequently arrived on planes from Florida, particularly Miami and Fort Lauderdale. The agents' attention to appellant Moore was occasioned by the fact that appellant disembarked from the Delta flight among the first of the passengers. This suggested to the agents that he had traveled first class, as they assert is common for drug couriers. Additionally, Agent Dunn testified that as appellant deplaned, he was "paying particular attention to people in the flight area but he was doing this in a furtive manner and that he continued similar observations of people passing him when he stopped and made brief use of a pillar telephone." The agents' interest in appellant was heightened when he walked by the steps to the lower level baggage area and continued down the corridor to an adjacent terminal without claiming any baggage.

In the American Airlines portion of the building, appellant was seen to take an escalator to the ground level and start to approach the taxi line there. What happened next is, as we see it, critical to the outcome of this case and we will quote the only testimony which deals with the original contact.

Q And in approaching Mr. Moore, would tell the Court what took place?

A Yes, sir.

I showed Mr. Moore my badge and I identified myself and asked him if I could talk with him a minute.

Q And did he respond to your request to talk with him?

A Yes; he said that I could.

Q And this was, again, outside the terminal in the public area?

A Yes; it was at the — on the sidewalk near the, near the road.

Q And how were you dressed, Agent Dunn?

A I don't know, just in casual clothes, sport shirt, trousers, jacket.

Q How was Agent McCoy dressed?

A Similar to the way I was dressed.

Q And did you display any weapon this initial approach?

A No, I did not.

Q Did Agent McCoy?

A No.

Q Did you or Agent McCoy, in anyway, have to physically restrain the defendant on this approach?

A No.

Q No, after he gave you permission to speak with him, what occurred then?

A I asked him if he had any identification and Mr. Moore said that he did and I asked him if I could see it, and he found his driver's license, driver's license and handed it to me.

I took him it from him. I saw, noted his name and noted it was a Michigan driver's license and saw that Mr. Moore was — his hands were trembling, to some extent, not a lot. I thought that he was nervous I then returned Mr. Moore's driver's license to him and I asked him some further questions.

Q And what questions did you ask him?

A I asked Mr. Moore if he was at the airport to catch a flight out of Detroit or if he had just arrived from another city.

Q And did you receive a response?

A Yes. Mr. Moore said he had come to the airport to catch a flight, a flight out, but that he had missed the flight and he was going back home.

Q And how did you respond?

A I asked Mr. Moore, "Are you telling me that you just didn't get off the flight from Florida?" And he said not that he recalled —

Q Next —

THE COURT: Is that what he said?

THE WITNESS: "Not that I recall."

THE COURT: "Not that I recall?"

THE WITNESS: Yes.

Q (By Mr. Felder): What next took place, Mr. Dunn?

A At that point I told Mr. Moore, myself and Agent McCoy were federal narcotic agents, and that we were looking for persons bringing narcotics into the Detroit area through the airport, and I asked him if he had any narcotics and he he said that he didn't.

I asked him if he had any narcotics in his briefcase, or on his person; he said that he didn't, and I asked him if he would object to a search of his briefcase, and he said that he would not.

Q And then what took place?

A Then, I suggested to Mr. Moore if he would consent to a search, that I'd do the search back inside the terminal, out of

the very public area that we were in on the sidewalk, outside, to save some embarrassment on either his part or my part.

Q And did Mr. Moore respond to that request?

A Yes. He said that he would go back inside the terminal with me.

• • •

Q And prior to going back into the terminal, you gave back to Mr. Moore his I.D., his driver's license?

A Driver's license, yes.

Q Now, inside the terminal, Special Agent Dunn, what took place then?

A Well, Mr. Moore — I explained to Mr. Moore that he didn't have to allow a search of his briefcase if he didn't want to. Mr. Moore said, again, said I could look in his briefcase.

He unlocked it, and it was a combination lock briefcase. He unlocked the briefcase; it was placed on the floor and he began — Mr. Moore began to open it. I asked him not to open it, not to open it himself, I preferred to open it myself.

• • •

Q Special Agent Dunn, prior to your opening the briefcase, at any time, did you ask Mr. Moore for airline tickets?

A Yes.

Q Where did that occur?

A On the sidewalk, outside, during my initial conversation with him.

Q And did he, did he show you any airline ticket?

A No. This was after I'd asked him the question about whether he was arriving or whether he was at the airport to take a flight out and he told me he had missed his flight.

I asked him, at that point, if he had an airline — his airline ticket with him and he said that he didn't.

THE COURT: He said what?

THE WITNESS: He said he didn't.

Q (By Mr. Felder): Directing your attention back to where you were opening his briefcase at the terminal, what occurred then?

A I opened the briefcase, saw it had minimal contents; two shirts that appeared — that were like new, that appeared like just had been bought, had some printing about Florida on them.

• • •

A Saw there was an absence of a change of clothing even; saw an airline ticket in the name of Mr. Moore, Ronnie Moore; it was for Delta Airline flight 1148 from Fort Lauderdale, to Detroit, first class, and there was —

Q That was the flight you you saw him deplane?

A Yes, sir.

Q Continue please.

A And had date stamp, date of issue that's put on by Delta Airlines which sold it, which was the same date, March 6th, indicating it had been bought by Mr. Moore earlier that day.

I also saw two pieces of paper which had some notations, numerals, figures, multiplication, adding, subtraction. One, in particular, I interpreted to be narcotics related.

Q Special Agent Dunn, with regard to the ticket you observed, would you tell the Court, if applicable, what indicators or indications you got from the tickets and the drug courier profiles?

A Well, the fact that Mr. Moore was coming from Fort Lauderdale which was — which I knew before hand. But, the fact it was a first class ticket, and the fact that it had been purchased earlier that day, were both consistent with narcotic courier characteristics.

• • •

Q And with regards to the sheet, inside the briefcase that you stated had numerals on it that were indicative of narcotics, would you be a little more specific regarding that?

A Yes. Just numbers appeared to be additions and multiplications. There was no notations next to the numbers. They were random, randomly written. One of the papers that the writing was on was Delta Airlines stationary.

So it was, I assume, Mr. Moore had made notations on — either on the way to Fort Lauderdale or back from Fort Lauderdale. And there was one, in particular, it was a multiplicaton stating it was 1800 times, and then there was another figure and — I believe it was 10 or 12, and the reason I associated that particular computation with narcotics is because — well, cocaine which is the, for which Miami and Fort Lauderdale are the source area, roughly sells for $1,800.00, $2,200.00 an ounce.

Q And after you made these observations of the contents of the briefcase, Special Agent Dunn, what next did you do?

A I told Mr. Moore, " Well, everything seems to be in order;" closed the briefcase and Mr. Moore seemed to — he was relaxed at that point.

I said "Mr. Moore, the nature of narcotics being what they are, they're small, they're easy to would you mind if I pated you down?"

At that time, Mr. Moore began to tremble, his hands began to tremble. He answered me but he had difficulty in finding

the words to answer me. In essence, he said that he objected to a pat down of his person.

Q Would you say, at this point in time, his demeanor was — he indicated more nervousness at this point in time than earlier?

A Yes, he did.

Q What then occurred?

A I said "Mr. Moore, I really believe that you're in possession of narcotics," and Mr. Moore did not answer me, he tried to say something, he was speechless, really, and he just, his, his head was trembling, his hands were shaking and, and I told Mr. Moore, I advised him he was under arrest.

Q And after advising Mr. Moore that he was under arrest, what did you do then?

A I immediately told him that he didn't have to say anything; if he did say anything it could be used against him in court and he had a right to an attorney and if he couldn't afford an attorney, one would be appointed for him.

I said "Now I'm going to have to pat you down," which I did.

Q And upon patting down Mr. Moore, what did you observe, if anything?

A I found in his coat pocket, a package contained in two cloths which were turned end-to-end and in the package was a white powdery substance in plastic bags.

I then handed the bags to one of the other agents who was assisting me at that time, I believe it was agent Bryda, and continued the arrest pat down of Mr. Moore.

Then I accompanied Mr. Moore to the D.E.A. office at the airport.

Q After Mr. Moore was taken to the office, at the airport, what occurred there, if anything?

A Well, there was — Mr. Moore was processed; that is, his personal history background information was obtained, name, telephone number, address, Social Security number, things of that nature.

He was formally advised of his Constitutional Rights by a printed form, which is available and is routinely given to an arrested person to read and he was fingerprinted and photographed.

Q At this time, or during this period of time, did Mr. Moore make any statements?

A Yes. He made a statement to — more directed to Agent McCoy because Agent McCoy was taking down Mr. Moore's personal history and discussing his rights with him.

Q Did you hear the statements?

A Yes, I heard the statements. I can't relate them verbatim as they were said, but in essence, statement were, "You got me, I'm guilty, I'm guilty as hell, I've lost everything; I sold my house, I made a profit on my house."

I believe the figure was $47,000.00 that Mr. Moore sold his house for; I think he said he made an $18,000.00 profit; he used that money to — when he went to Florida, and since we got him, he lost everything that he had.

Q The substance, the white powdery substance, at that time, or shortly thereafter was field tested, I take I take it?

A Yes. It was field tested after myself and the other agents got back to the office and it was a positive reaction for cocaine.

THE COURT: How much was it?
THE WITNESS: 220 grams.

Cross examination by appellant's attorney only served to emphasize most of these facts but it did develop the following additional facts:

Q Did you say, did you advise him that he didn't have to speak with you?

A No.

Q Did you advise him that he could leave?

A No.

Further, appellant's counsel developed the following:

Q Did you advise Mr. Moore that he had a right to refuse to be searched or patted down?

A Yes; when we first come back inside, prior to conducting the search of his briefcase, I said "You don't — you don't have to let us look into your briefcase if you don't want to."

Q Did you give him the same advise when you asked him about patting him down?

A No.

Q He refused to let you search him?

A Yes.

Q And that is when you arrested him?

A At that point, yes.

Q Was Mr. Moore free to leave when you approached him at the curb?

If he had walked away from you, would you have just let him go?

A (Pause) I, I don't really know. I'd have to be presented with the situation then and there.

Although two other agents testified before the District Judge, no additional relevant information was adduced except for the following testimony which pertains to a statement made by appellant immediately after appellant signed a document stating that he had been advised of his constitutional rights:

Q (By Mr. Felder): Special Agent McCoy, after you — Defendant Moore signed that document, did he make any statements?

A Yes, he blurted out a statement.

Q You say he blurted out a statement?

A I, more or less, stared at him for a half a minute after I had him sign.

THE COURT: You did what, you say?

THE WITNESS: I looked straight at him for about a half a minute and didn't say anything to him.

THE COURT: Go ahead.

Q (By Mr. Felder): And what did he blurt out, as you say?

A I have these notes here which I took and wrote down about five minutes after he blurted out the statement.

He said "D.E.A. got him —

THE COURT: Said what?

THE WITNESS: Said "We got it, I'm as guilty as hell and he sold a house last April for 47,000 made an $18,000.00 profit;" that he lost everything when we caught him, he lost everything.

Then I asked him when he went to Florida. He said he went that day to Florida and I asked him if he wanted to help himself out of this mess by telling of others involved.

He said he could not give anybody else up, as he did it all by himself.

As to the legality of the approach or stop, however it may be described, we note a decided distinction between this case and the facts of *United states* v. *Jefferson*. In the *Jefferson* case, this court said:

> In this case, agent Markonni did not merely stop Jefferson to ask him a few questions; he stopped him and immmediately after identifying himself as a DEA agent requested Jefferson to accompany him to the baggage claims office. In these circumstances, Jefferson could not reasonably believe that he was free to leave.[1] This was a "seizure" within the meaning of the Fourth Amendment.

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[1]We note that Justice Stewart's opinion in *Mendenhall* was joined in by only Justice Rehnquist. Justice Powell's concurring opinion was joined in by the Chief Justice and by Justice Blackmun, and in that opinion he stated: "For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two government agents for her driver's license and ticket is extremely close." 446 U.S. at 560, n. 1, 100 S.Ct. at 1873 n. 1 (Powell, J., concurring). Justice Powell believed the agents had probable cause to justify the stop whether or not it was a seizure. Four Justices believed that the brief stop to ask for identification was a "seizure." *See also, Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed:2d 824 (1979) (defendant who was picked up for a custodial interrogation was "seized" within the meaning of the Fourth Amendment).

United States v. *Jefferson*, 650 F.2d 854, 856 (1981).

In contrast to our instant case, the drug enforcement agent testified that he asked appellant whether he could ask him a few questions and received an affirmative answer.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the court said in a footnote:

> We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrustion upon constitutionally protected rights had occurred.

392 U.S. at 19 n. 16.

Paraphrasing this discussion of "seizure" as opposed to "personal intercourse between policemen and citizens," we would observe about the drug enforcement agents' approach to appellant in this case that the apparently non-threatening approach, "Can I ask you a few questions?" serves to distinguish this case from *Jefferson*. This is of critical importance because at the time appellant agreed to answer questions and likewise agreed to open his brief case, the drug enforcement agents did not have probable cause for arrest or seizure. There are doubtless many totally innocent citizens who leave planes among the first passengers and who walk through the terminal looking about them in a fashion which a drug enforcement agent could construe as being nervous and who take a circuitous route perhaps by sheer mistake rather than by an attempt to evade. Although good police work might suggest close observance of someone who left a plane in Detroit which had just come from a major drug supply center in

Florida, such facts as are shown here did not constitute reasonable suspicion of criminal activity. See *Reid* v. *Georgia*, 448 U.S. 438 (1980).

What followed the initial contact, however, gave the drug enforcement agents positive knowledge that appellant had lied in denying his arrival by the Delta morning flight from Fort Lauderdale. The ticket in the brief case confirmed his first class status which previously has been an educated surmise. The numbers on the Delta stationery corresponded with the agents' knowledge of the price of cocaine in Florida.

In short, by the time appellant refused to permit a search of his person, the facts require us to hold that the agents had evidence which constituted probable cause to believe that appellant was carrying drugs.

The judgment of conviction is affirmed.

APPENDIX C

No. 80-1832
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

RONNIE D. MOORE,
Defendant-Appellant,

Before: EDWARDS, Chief Judge, LIVELY and KEITH Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court

/s/ John D. H
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,
Plaintiff,

v.

RONNIE D. MOORE,
Defendant

Excerpts from the Trial

Transcripts containing the oral opinion of the Hon. Charles Joiner denying the motion to suppress.

THE COURT: I find this case and cases that raise problems somewhat like this to be interesting and difficult. I find that I'm best able to solve these cases by taking as much an ad hoc approach to each case, so I have a clear view what each factor is as to the particular case and then apply the rules, as I understand them, to the particular facts.

I do believe the proof establishes, in this case, that the defendant did leave the airplane; first or nearly first; that he was observed by the agent; that he did appear to be exhibiting conduct that was, that was not the usual kind of conduct that people exhibit when they leave an airplane; that he made some unusual glances around to determine who was there that are different than the kind of glance people look when looking around for people expecting to find people and expecting to find friends and companions that are coming to meet them; that he continued this conduct as he attempted to or made his two telephone communications.

I do believe, also, that the conduct was distinctly unusual in that he by-passed the normal route that would take him to the exit that is provided by the Metropolitan Airport authority for persons who leave Delta Airlines; and instead of using the escalators to the baggage claim area and the transportation that is most convenient to these passengers, headed out the — through the main incoming ticket area available to all passengers at all airlines and then left the building and then came back again and went down an escalator that took him into a completely different and completely separate baggage claim area from which he then attempted to get a cab.

This conduct, it seems to me, I believe, from the evidence that's been produced in this case, is quite out of the ordinary and exhibits something different than the normal traveler.

Now, the first ground on which the motion to suppress is based is that the initial stop was illegal and therefore, everything that has followed therefrom, is inappropriate.

I subscribe, and since I'm still free to subscribe to one view or the other, because I don't think the Supreme Court squarely faced this, I subscribe, very definitely and forthrightly to the view that is expressed by Justice Stewart and Justice Rehnquist on this particular issue. In fact, I think it's appropriate for a police officer, and should be appropriate for a police officer, to interrogate the innocent as well as the guilty, the person who they believe to be, — any way they can, in helping to to get at criminal activities, as long as they make it very clear this is a request on their part; that there is no obligation on their part, your part to do anything and that you're free to leave and so forth.

I think it's appropriate for an officer to engage me in conversation or engage anyone else in conversation, and that such an engagement in conversation is not any kind of a stop that could be prescribed by the Fourth Amendment.

The test enunciated by Justice Stewart in Mendenhall, at that point, is whether it's — a reasonable person could act reasonably a expect he was under arrest at that time, be inhibited from his freedom. The facts, in this case, seems to indicate the kind of approach that was made, the request perhaps made, the kind of questions that were asked, would not inhibit a person of the appearance of the defendant.

The second ground on which the motion to suppress is based is that — before I go to the second ground, I want to back up and make findings as relate to if this motion is erroneous; in other words, if the Court does not in the long run adopt the two main paragraphs that is enunciated in Mendenhall.

I think the facts, as enunciated, are sufficient under the Powell opinion to be an investigative stop at this point. I think there were sufficient grounds that have been articulated here to justify, under all the circumstances of the case, the kind of stop that was made, and I think on this score, the Mendenhall plurality is clearly controlling; that the stop, in this case, was every bit as authorized as it was in Mendenhall, and it was there was reasonable ground for making the stop and inquiries that were made, and I would base my opinion on this fact.

The second ground on which the motion to suppress is made is based upon the fact — at the time there was, in fact, no probable cause to arrest and, therefore, everything that followed, thereafter, includng the search, would not be valid.

Now, when we come to the arrest, we have a different set of facts that are before the officers. In addition to all of the information that the officers had up to the time of the investigative stop, which is suspicious, in addition to all of that, we have the evidence of two major falsifications bearing directly upon the purpose of the inquiry and the disproving of these particular statements. We have the statement that, in fact, he did not

come from Fort Lauderdale; we have the statement that he did not, in fact, have a ticket. Both are demonstratively false.

We have the appearance, he clearly is a person not just temporizing with the officers, but one who is caught in a great deal of trouble, himself, and which I think, when all of these facts have fully have been developed as they have been here, clearly indicate in light of everything that the officers knew, that there would be a probable cause to arrest this particular defendant. The persons are charged with the enforcement of the narcotic laws.

There is evidence in the case that the place from which this person came is a person — is a place from which large amounts of narcotics come to this city. Evidence of all the various items that relate to the ways in which the agents can articulate, the various minutia that go into the thinking process as to whether somebody can be approached or not. But, in addition to that, there is evidence, specifically, about the particular facts alleged in connection with the particular trip and there is evidence that during this time, there was a great deal of additional nervousness and shaking and so forth on the part of the defendant.

I do not think it is a basis for the determination of probable cause that the defendant failed to agree to a search. I, flatly, think that's an irrelevancy at this point. If that were an irrelevancy, it would be, it would bootstrap — it would be permitting bootstrapping 100 percent and I don't think that's proper.

I do believe, under all of the circumstances here, that there is evidence from which it can be determined that — which I believe would indicate it would be cause.

I do not believe that the statements made at a subsequent time went to the basis of probable cause. Probable cause has to be determined as of the time the arrest is made. So, the subse-

quent — probable cause has to be determined as of the time the arrest is made, not at the time, subsequent time the statements were made.

Based on this, I would hold the motion to suppress is not granted, is denied.